Supreme Court, U.S.
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Case Number

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

KEN BREWER,

Petitioner,

vs

CLARKE COUNTY SCHOOL DISTRICT,
HANS J. SCHACHT and CHRIS GOOD
in their individual capacities.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred in holding that only the employer can deprive a governmental employee of their constitutional liberty interest.

2. Whether the lower courts erred in holding that as a matter of law, publication of false, stigmatizing statements at a school board meeting called by the school system for the purpose of releasing the statements, but written by another government agency, followed within days by the firing of the employee, without a hearing, cannot cause a liberty interest deprivation.

3. Whether a coach who has for almost twenty years made a very successful career out of coaching high school football deserves the due process protection of the Fourteenth Amendment.

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STATEMENT OF JURISDICTION

1. The Eleventh Circuit Court of Appeals affirmed the judgment of the U.S. District Court for the Middle District of Georgia on January 4, 1995. Rehearing was denied March 14, 1995.

2. This court has jurisdiction to hear this question pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS and STATUTES

U.S. Const. Amend. XIV, § 1: All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the U.S. or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

O.C.G.A. § 20-2-796: Investigations by commission; authority over applicants.

(a) Upon request as provided in subsection (b) of this Code section, the commission shall be authorized to investigate:

(1) Alleged violations by an educator of any law of this state pertaining to educators or the profession of education;

(2) Alleged violations by an educator of the code of ethics of the commission;

(3) Alleged violations by an educator of rules, regulations, or policies of the state board, the commission, the Professional Standards Commission, or a local board; or

(4) Complaints alleging a failure by an educator to meet or comply with standards of performance of the commission, the Professional Standards Commission, the state board, or a local board.

(b) The commission shall not be authorized, on its own motion, to make an investigation pursuant to subsection (a) of this Code section but may make such an investigation:

(1) Upon the request of a local board;

(2) Upon the request of the state board or the Professional Standards Commission; or

(3) Upon the request of one or more individual residents of this state.

(c) If the commission agrees to make an investigation pursuant to a request made under paragraphs (2) and (3) of subsection (b) of this Code section and if the proposed investigation involves one or more educators employed by a local board, the commission shall, prior to beginning such investigation, notify, in writing, the local board employing the educators

of the following:

(1) The names and addresses of the parties making the complaint that gave rise to the proposed investigation;

(2) The names of the educators employed by the local board who are proposed to be investigated; and

(3) An explanation of the complaint made against the educators employed by the local board.

(d) In making an investigation authorized by this Code section, the commission shall:

(1) Be authorized to conduct probable cause and plenary hearings;

(2) Have the power to administer oaths and affirmations; and

(3) Have the power to issue subpoenas in the name of the commission to compel the attendance of witnesses and the production of documents and other things to be used as evidence. Such subpoenas shall be served in any manner now or hereafter provided for service of

subpoenas issued by the superior courts. In the event any person fails or refuses to obey a subpoena issued under this paragraph, such failure or refusal shall constitute contempt of the commission. Upon application by the commission to the superior court of the county wherein such person resides or is found, the superior court shall have power, after notice and hearing, to adjudge such person in contempt and to punish such person by a fine not exceeding $300.00 or by imprisonment not exceeding 20 days or by both such fine and imprisonment and to enter such other orders and take such other action as may be necessary to enforce compliance with and obedience to the subpoena. At such hearing, the person subpoenaed shall be entitled to make any defense and to show any valid reason why he failed or refused to comply with the subpoena.

O.C.G.A. § 20-2-797: Recommendations of commission as to disciplinary actions; consultative services and recommendations.

(a) Upon its completion of any investigation authorized by Code § 20-2-796, the commission may furnish to the local board, the state board, the Professional Standards Commission, or any combination thereof, findings of fact, conclusions of law, and recommendations. Based on its findings of fact and conclusions of law, the commission may recommend that no action be taken against the educators involved if the commission, in its investigation, found that the complaints against the educators were not justified. If the commission, in its investigation, found justification for the complaints against the educators involved, it may recommend any combination of the following actions:

(1) That the educators be warned or reprimanded;

(2) That the contracts of the educators be terminated, suspended, or not renewed; or

(3) That the certificates of the educators be suspended or revoked.

(b) In addition to making recommendations pursuant to subsection (a) of this Code section, the commission may provide consultative services pertaining to the teaching profession to anyone who has a vested interest in education and make recommendations to the state board, to the Professional Standards Commission, or to local boards which will promote an improvement in the teaching profession. The commission shall be authorized to hold meetings for the purposes of determining recommendations pursuant to this subsection; and, at such meetings, the commission may receive testimony from educators or other persons interested in the improvement of the teaching profession; but the powers provided by subsection (d) of Code § 20-2-796 may not be exercised pursuant to the authority of this subsection.

(Ga. L. 1967, p. 840, 1; Ga. L. 1968, p. 330, 1; Ga. L. 1972, p. 555, 1; Ga. L. 1980, p. 1214, 8; Ga. L. 1991, p. 1546, 7.)

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1983 against Clarke County School District ("CCSD") [a public school district], Hans J. Schacht ("Schacht") [the then Executive Director of the Professional Practices Commission ("PPC")] and Chris Good ("Good") [an investigator for the PPC], in their individual capacity, for acts which deprived Ken Brewer of his constitutional liberty and property interests.

In November of 1989, the PPC began an investigation into alleged grade changes at Cedar Shoals High School, the school where the Petitioner, Ken Brewer ("Brewer") taught social studies and was the Head Football Coach. In February of 1990, Schacht delivered to CCSD, in a specially called, widely publicized, school board meeting, a copy of a 32 page report prepared by Good, which contained false statements and implied that Brewer a liar and a cheater. Pl's Ex. 3 (PPC report at pp. 25-26]

Georgia requires that a teacher have a teaching certificate to teach and coach in the public schools. O.C.G.A. § 20-2-200. Schacht told the school district and the public that the PPC was recommending that Brewer's certificate to teach be suspended for two years. [R6-155-121,122] Brewer was denied a hearing by the school system and was "terminated immediately" from his position as the Head Football Coach. [Def.'s Ex. 18]

The PPC also refused to grant Brewer a hearing on his teaching certificate until more than a year and four months after this public announcement. [R7-156-202]

Brewer had been a very successful high school coach when he was recruited in 1986 for this head football position. [R7-156-32; R6-155-266,148,149]. He had never held a teaching job when he didn't coach. At the time of the publication, Brewer's football team had compiled a 9-1 record. [R6-155-240] They had already beaten the team that went on to play for the

AAAA State Championship. It would have been Cedar Shoals first state championship. [R7-156-32; R6-155-266, 148,149]

Coach Brewer was too humiliated to return to his teaching job and face the students he had motivated to be leaders and winners after he was fired for "cheating and lying". [R7-156-53] Brewer has applied for over eighteen head football jobs and has been rejected by every high school. R6-155-300,301]. He suffered a heart attack at the age of 42 and within a year of this public humiliation.

REASONS FOR GRANTING THE WRIT

The judgment of the lower courts should be reviewed by this court. The Eleventh Circuit has departed from U.S. Supreme Court precedent and its decisions are in conflict with other U.S. courts of appeals in such a manner as to call for an exercise of this court's power of supervision.

I. The lower courts have held that only an employee's employer can deprive them of their constitutional liberty interest.

In this case, the eleventh circuit and the district court have used inverted reasoning to conclude that a government employee ("teacher") can only be deprived of his constitutional liberty interest by his employer. *Blackburn v City of Marshall,* 42 F.3d 925, 931, (5th Cir. 1995).

They held that the Clarke County School District was the teacher's employer for constitutional protection, but the State Professional Practices Commission who had the power to revoke his teaching certificate was not the plaintiff's employer, therefore there could be no deprivation of liberty by the PPC.

The Eleventh Circuit has addressed the liberty interest issue before. "In 1978 the seminal case on determining whether public statements deprived the object of those statements of a liberty interest was *Paul v*

Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), where the Supreme Court rejected the proposition that a stigmatizing statement standing alone can support a claim based on procedural due process. The Court held, that to be actionable, the stigmatizing statement had to deprive the person of a right held under law *Id.* at 708, 96 S.Ct. at 1164." *Howe v Baker*, 796 F.2d 1355 (11th Cir. 1986).

"To allege a deprivation of liberty, one must show that the state published a false, stigmatizing statement in the course of altering a state law right or status". *Hardiman v Jefferson County BOE*, 709 F.2d 635, 639 (1983).

The Fifth Circuit explains that even though the facts of *Blackburn* do not involve the standard employer-employee relationship, [his] "relationship with the state contained a sufficient indicia of a public employment relationship. *Blackburn* at 933.

There are other cases where the courts have analyzed the liberty interest where there was

not a standard employer-employee relationship. The second circuit addressed a claim by a woman whose name was put on a state registry of suspected child abusers. *Valmonte v Bane,* 18 F.3d 992 (2nd Cir. 1994), holding that her name on the list was enough to implicate her reputationt; that dissemination to prosepective employers is the precies conduct which gives rise to syigmatization. *Valmonte,* as Coach Brewer in this situation, alleges much more than a loss of employment flowing from the effects of simple defamation. "The Central Registry does not simply defame Valmonte, it places a tangible burden on her employment prospects. *Id. at 1001.*

An attorney who was not an employee of the City of North Miami brought an action against various defendants alleging that she had been deprived of liberty and property interests without due process of law. Remanding this case back to the district court, the appellate court said "appellant has sufficiently alleged injury to his business reputation. We see no reason why

an attorney is not entitled to property or liberty interests in his or her business (professional) reputation/goodwill when the same rights have been extended to other businesses. *See Marrero*, 625 F.2d at 515 (jewelry business); *Espanola Way*, 690 F.2d at 829 (hotel business); *Economic Development Corp.*, 782 F.2d at 954 (construction business)." *Little v City of Miami*, 805 F.2d 962 (11th Cir. 1986).

The PPC ultimately had control over Coach Brewer's termination. If he did not have a teaching certificate, he could not work as a teacher. "A concurrent link between the defamation and dismissal is necessary if the employee is to succeed on a liberty deprivation claim." *Martz v Incorporated Village of Valley Stream*, 22 F.3d 26, 32 (2nd Cir. 1994).

In this case, the court has construed *Buxton v Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989) as saying that **only** the employer can deprive a governmental employee of a liberty or property interest. See A-23 & C-16.

Every citizen enjoys the protection of the constitution against governmental interference with their right to work. See *Blackburn v City of Marshall*, 42 F.3d 925, 931, (5th Cir. 1995).

The Ninth Circuit has also addressed the issue with facts which do not involve the standard employee-employer relationship. See *Havekost v U.S. Dept. of Navy*, 925 F.2d 316 (9th Cir. 1991).

Mr. Hans Schacht and Mr. Chris Good worked for the State Professional Practices Commission when they were called on to investigate a grade changing scandal at a high school in Athens, Georgia. Without giving Coach Brewer a hearing, Schacht announced to a packed board meeting, that he was recommending that Brewer's teaching certificate be suspended for two years.

Where a state actor has made concrete false assertions of wrongdoing on the part of a plaintiff, the result could create sufficient stigma to interfere with the plaintiff's liberty or property interests. *Blackburn* at 936.

The property interest is an individual entitlement grounded in state law. Georgia law is clear that a teaching license is property. *State Bd. of Ed. v Drury,* 263 Ga 429 (1993); *Ga. Real Estate Com. v Horne,* 141 Ga. App. 226, 231(3), 233 S.E.2d 16 (1977). After a court determines that an individual has a property interest, then the analysis should proceed to whether the benefits of the due process clause of the fourteenth amendment have been abrogated.

Schacht deprived Brewer of his property interest in his teaching license and his liberty interest in his right to work by directing Clarke County School District to "use the report for study, deliberation, and to make decisions about employees and their contract tenure that are ethically and legally defensible", [See B-16 this Appendix] and then refusing to grant him a timely hearing.

II. Coach Brewer was entitled to a hearing because he was fired within days of the school board calling a meeting to disseminate a report that essentially called him a cheater and a liar.

The Superintendent of Clarke County School District recommended that Coach Brewer be fired immediately from his job as head football coach due mostly to the PPC report read at the board meeting.

In this situation, the *immediate* termination of Brewer implied with clarity that Brewer was not worthy of coaching football; he is guilty of what Schacht just read to you. The lower courts have said that *Buxton* precludes any recovery by Coach Brewer because the school board did not write the report that was read at their board meeting.

III. Brewer's career was coaching and that "status" was destroyed.

In 1990 the Eleventh Circuit expressed that "the significant alteration or extinguishment of

a right or status recognized by state law ... supported the invocation of the procedural guarantees contained in the due process clause of the fourteenth amendment. *Von Stein v Brescher,* 904 F.2d 572, 581 (11th Cir. 1990).

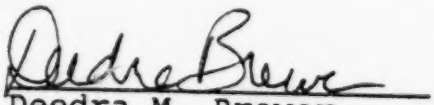
Both Schacht and the Clarke County School District deprived Coach Brewer of his liberty interest in his career as a coach. It is now beyond any doubt that discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the fourteenth amendment to a procedural opportunity to clear one's name. *Rosenstein v City of Dallas, Texas,* 876 F.2d 392,395 (5th Cir. 1989) aff'd 901 F.2d 61 (5th Cir.)(en banc) cert denied 498 U.S. 855, 111 S.Ct. 153, 112 L.Ed 2d 119 (1990).

CONCLUSION

"A carefully conceived scheme of innuendo meets the dissemination of a false and defamatory impression requirement." *Thomas v*

McDaniel, 793 F.2d 1247, 1250 (11th Cir. 1986). Wherefore, Petitioner prays that a Writ of Certiorari issue from this honorable Court to review the judgment of the U.S. Court of Appeals in Case No. 93-9446 dated January 4, 1995. In the event the Petition is granted, Petitioners pray that the judgment of the Court below be reversed and that the cause be remanded.

Respectfully Submitted.



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